
COMMONWEALTH OF VIRGINIA



OFFICE OF THE GOVERNOR

Executive Order 103 (2005)

PROMOTING DIVERSITY AND EQUAL OPPORTUNITY FOR SMALL, WOMAN-, AND MINORITY-OWNED BUSINESS ENTERPRISES IN STATE PROCUREMENT

Background

Securing the economic health and vitality of all of the Commonwealth's businesses is critical to the future of Virginia and to the quality of life of all Virginians. Promoting and helping to grow the Commonwealth's enterprises is an integral part of Virginia's overall economic development mission, supporting its efforts toward job creation, community empowerment and economic revitalization.

An important element of expanding economic opportunities to all Virginians lies in providing opportunities for small businesses, including businesses owned by women and minorities, to participate in the purchasing programs of the state.

The Commonwealth acknowledges that historically, businesses owned by women and minorities have not sufficiently benefited from such commercial opportunities. Despite this history, Virginia is fully committed to the principals of equal opportunity.

The Commonwealth's commitment has been evidenced, in part, by Executive Order 29 (EO 29) and the accompanying guidelines to all state agencies and public bodies. EO 29 enhances the equal opportunity and nondiscrimination requirements set forth in the Virginia Public Procurement Act (VPPA). The Commonwealth's commitment has also been evidenced by our Small, Woman, and Minority Business (SWAM) Procurement initiative, designed to improve the participation of these businesses in the purchasing programs of the state. This effort has yielded improved results over the last year: both

minority and woman-owned business participation levels have grown from the combined 1.27 percent level documented by the *Commonwealth's Procurement Disparity Study* to an approximate level of 2 percent for minorities and 2.4 percent for women. Prior to EO 29, erroneously reported totals for minority business participation typically averaged 5-7 percent. Though improved, both levels remain substantially below our targets for minority-owned businesses and for businesses owned by women.

In addition, small business participation in state contracting, formerly held to be approximately 20 percent, has been, in fact, a mere 8-10 percent. Combined SWAM business participation, despite our progress, hovers below 15 percent, significantly less than the established statewide goal of 40 percent.

SWAM purchasing reports have shown that small businesses, including businesses owned by women and minorities, continue to lag behind in their participation in the state's purchasing initiatives. These businesses, representing nearly 99 percent of all Virginia businesses, are the backbone of the state's economy and they represent the Commonwealth's best hope for a prosperous future. Consequently, the policy of promoting small businesses, including businesses owned by women and minorities, will benefit all members of the Virginia family.

Diversifying the state's contracting is a challenging effort that takes more than four years. This objective transcends gubernatorial administrations, and thereby requires a long-term institutional commitment.

Initial Efforts

During my Administration, we have undertaken a number of efforts that have begun to change course. These actions include:

1. Summer 2002: We issued Executive Order Number 29 (2002) directing all Cabinet members and heads of all state agencies and public bodies to implement the equal opportunity and nondiscrimination requirements set forth in the Virginia Public Procurement Act ("VPPA"), § 2.2-4310(A), Code of Virginia (2005), which prohibits all public bodies from discriminating in government contracts on the basis of race, religion, color, sex, or national origin, and requires them to include in solicitations companies included in a list assembled by the Department of Minority Business Enterprise (DMBE).
2. Fall 2002: We discovered and rectified significant errors in the database causing the historical over-reporting of expenditures with small, woman and minority firms.
3. Winter/Spring 2003: We championed the need for a study of disparities in the state's procurement programs and won unanimous legislative passage of S.J. 359.

4. January 2004: We released the *Procurement Disparity Study of the Commonwealth of Virginia* (the “Study”) after an accelerated and detailed investigation. The Study found that total Commonwealth spending with woman- and minority-owned business enterprises in fiscal years 1998-2002 (study period) was very low at a combined level of 1.27 percent of total spending.
5. Winter/Spring 2004: We collaborated with the General Assembly to unanimously pass HB 1145 amending the VPPA to authorize and encourage the Governor and localities to implement remedial programs when a rational basis for small business enhancement exists or analysis documents statistically significant disparity between the availability and utilization of woman- and minority-owned businesses. The legislation took effect July 2004.
6. July 2004: We developed and implemented the Commonwealth’s Remediation Plan for all executive branch agencies and institutions. The Plan established the overall aspirational objective of 40 percent for small business participation, directed all state agencies and institutions to develop purchasing programs by September 1, 2004, and established within DMBE a certification program for all Small Business Enterprises, Minority Business Enterprises, and Woman Business Enterprises participating in the remediation program.
7. Fall 2004: We allowed agencies and institutions to set aside up to 30 percent of their discretionary funds for contracts with small businesses in accordance with their respective SWAM Plans.
8. Spring 2005: We unveiled an On-Line Certification Service at DMBE to provide an easy and convenient method for SWAM and DBE certifications.
9. Summer 2005: We began weekly reporting by secretariat, with the Director of the Department of Minority Business Enterprise attending and presenting at every cabinet meeting.
10. Fall 2005: Quarterly results were the best measured to date.

On the strength of these efforts, the participation levels of SWAM businesses in state contracting awards have improved significantly. However, the actual awards are still disappointing compared to the representation of these businesses in Virginia’s economy.

Continuing Efforts

It is clear that the Commonwealth must continue on its course toward affording small businesses the opportunity to compete equitably for the Commonwealth’s business. The following directives currently in place are therefore hereby continued:

1. The statewide aspirational goal of 40 percent of the Commonwealth's discretionary spending in combined prime and sub contracts for small businesses including businesses owned by women and minorities.
2. The annual written action plan required of agencies and institutions to facilitate the participation of small businesses, including businesses owned by women and minorities. The plans shall be developed and submitted to DMBE and the appropriate Cabinet Secretary on September 1 of each Fiscal Year.
3. The requirement that each agency and institution designate, yearly, a Procurement Champion to ensure nondiscrimination in the solicitation and awarding of contracts.
4. The requirement for DMBE certification of small businesses and of woman-owned and minority-owned businesses to ensure reliable and consistent reporting of their participation in the Commonwealth's purchasing programs.
5. The definitions established and incorporated in the certification procedures of DMBE for small business enterprise (SBE), women's business enterprise (WBE), and minority business enterprise (MBE). Also continued is the definition established for a disadvantaged business enterprise (DBE).
6. The requirement that the Department of General Services (DGS) and the Virginia Information Technology Agency promulgate guidance on SWAM purchasing in all relevant purchasing manuals and make available to all purchasing officials.
7. The implementation of small business enhancement tools, including, but not limited to, the small business set-aside, unbundling of selected State contracts, small procurements under \$5,000, and early posting of potential contract awards.
8. The requirement that each prime contractor whose procurement bid included a SWAM participation component submit evidence and certification of compliance with the SWAM Procurement Plan on or before the request for final payment. Final payment, under the contract, may be withheld until such certification is delivered and, if necessary, confirmed by the agency or institution, or other appropriate penalties may be assessed in lieu of withholding such payments.
9. The requirement that each contracting or certifying agency or institution, in cooperation with DMBE and DGS, contractually provide for appropriate auditing of vendors and contracts in order to assure compliance with certification requirements, SWAM subcontracting plans, and other required provisions. Such audits shall include the right to make on-site audits and review documents at any time during the term of the applicable contract or certification.
10. The inclusion of progress toward achievement of SWAM objectives as an evaluation criteria for the chief executive officer for each agency and institution. Also continued

is the use of said criteria in the evaluation of senior management and procurement personnel by the agency head or chief executive officer.

11. The requirement that state agencies and institutions work together with DMBE and the Department of Business Assistance to seek to increase the number of qualified minority and woman-owned businesses who are available to do business with the Commonwealth.
12. The updating by DMBE of statistics of SWAM participation, by gender and ethnicity, in relevant purchasing categories according to the findings identified in periodic statistical analyses of the availability and utilization of SWAM businesses in the purchasing programs of the Commonwealth, and submission of recommendations to the Governor. DMBE shall be responsible for making information on trends in SWAM participation available to the Cabinet and to the agencies, in order that current information on the state's progress toward remediating the disparity identified with woman-owned and minority-owned businesses is made available to decision-makers.

New Directives

I hereby direct the following:

1. Include all certified woman-owned and minority-owned firms in the definition of certified small business when said definition is utilized for procurement actions;
2. Require a Small Business Subcontracting Plan in all contracts over \$100,000;
3. Direct purchasing officers to modify evaluation criteria that prevent qualified companies from being excluded from state business based on narrow definitions of prior experience;
4. Require all applicable purchasing manuals to fully incorporate the new SWAM procedures, including all agencies, institutions, colleges and universities and political subdivisions subject to the VPPA;
5. Require all agencies, institutions, colleges, and universities to post future procurement opportunities on a new section of the eVA web site for the public to see at anytime and encourage all public bodies to post on this web site;
6. Require certified small business participation in every RFP for professional and non-professional services (with allowance for good faith efforts which shall be prescribed by DMBE in cooperation with the Department of General Services and the Virginia Information Technology Agency and incorporated in the relevant purchasing manuals);

7. Allow small business participation plan(s) to be used as weighted criteria to evaluate proposals;
8. Allow award to a qualified, reasonably priced, certified small business even if it is other than the lowest bidder or most successful offeror for all procurements, including construction; and
9. Include SWAM payment data and eVA commitments in VITA's new statewide management system.

These SWAM directives are designed to increase the overall pool of qualified vendors and thereby expand competitive access. They allow agencies and institutions to continue to seek quality products and services at competitive prices while at the same time advancing the Commonwealth's objectives of promoting small businesses and providing equal opportunity in state purchasing.

By virtue of the authority vested in me as Governor under Article V of the Constitution of Virginia and the laws of the Commonwealth, including but not limited to Title 2.2 of the Code of Virginia, and subject to my continuing and ultimate authority and responsibility to act in such matters, Executive Order Number 29 (2002) is hereby rescinded. I direct the Cabinet and the heads of all executive branch agencies and public bodies to implement and advance this Executive Order to promote diversity and equal opportunity in state procurement activities for Virginia's small businesses, including businesses owned by women and minorities.

This Executive Order shall be effective upon its signing and shall remain in full force and effect until June 30, 2006, unless amended or rescinded by further executive order. Given under my hand and under the Seal of the Commonwealth of Virginia this 13th day of December 2005.

Mark R. Warner

Attest:

Secretary of the Commonwealth